82-1130

NO. _____

October Term, 1982

JOSEPH M. SIVIGLIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE
TENTH CIRCUIT
(Decision En Banc, June 23, 1982)
(Petition for Rehearing
Denied En Banc 10 September 1982)

ROGER S. HANSON, ESQ.
518 South Broadway
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Member of Bar
U.S. Supreme Court
Attorney for Petitioner

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In accord with Rule 21, Rules of the Supreme Court of the United States, petitioner avers the following:

(a) Questions Presented for Review:

This entire Petition for Certiorari seeks a nationwide interpretation of Federal Rule Criminal Procedure 33, under an existing conflict in the Circuits, where the U.S. 10th Circuit en banc has ruled that it has permanently lost jurisdiction of the appeal on the merits by granting a motion to remand and it includes the following subsidiary issues/questions:

1. Whether a United States Court of Appeals should deny without prejudice a motion to remand a pending appeal in a Federal Criminal conviction until first an application is made to the trial level United States District Court under Rule 33, Federal Rules of Criminal Procedure where the defendant/petitioner/appellant acting by counsel, seeks remand in order to make a Motion for a New Trial pending that appeal?

2. Whether the conflict among the various United States Court of Appeals concerning interpretation of F.R.Crim.P. 33 requires the Grant of Certiorari to interpret this rule and resolve the conflict. See in this regard United States v. Phillips, 558 F.2d 363 (6th Cir. 1977) and United States v. Fuentes-Lozano, 580 F.2d 724 (5th Cir. 1978) (see also the follow-up appeal on the merits at 600 F.2d 552 (5th Cir. 1979)) requiring that the Circuit Court deny application for remand until application is first made to the District Court; cf. the instant case, where U.S. 10th Circuit grants said motion and rules it has permanently lost jurisdiction of the merits of the pending appeal.

3. Whether a UnitedStates Court of Appeals permanently loses jurisdiction of a pending Federal Criminal appeal under Rule 33, F.R. Crim.P., by remand of that appeal to allow the District Court to consider a motion for a new trial made during the pending Federal

Criminal appeal?

4. Whether, in view of the large number of existing authorities which uniformly hold, mandate, or at least suggest that application for remand to the District Court under Rule 33 of a Federal Criminal Appeal pending in the U.S Circuit must first be made to the District Judg who will then seek remand if and only if he fee the motion for a new trial meritorious, has this petitioner been denied the effective assistance of counsel guaranteed under the 6th Amendment to the United States Constitution by his counsel on appeal solely and initially seeking remand of the pending appeal by filing said application in the U.S. Circuit Court and failing to seek only a temporary and qualified remand, resulting in loss of the entire appeal without consideration onthe merits because the Circuit Court ruled it hadpermanently lost jurisdiction when it remanded to the U.S. District Court?

5. Whether the U.S. 10th Circuit can

retroactively apply a newly promulgated precedural decision so as to permanently deny this petitioner resolution of the appeal of his conviction of a Federal Crime without a Hearing on the merits, on its own interpretaion that it has permanently lost jurisdiction upon remand to the U.S. District Court?

(b) As far as is known, the only parties affected by this case and petition are the respondent United States and the petitioner Joseph M. Siviglia.

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PETITION FOR CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE
TENTH CIRCUIT

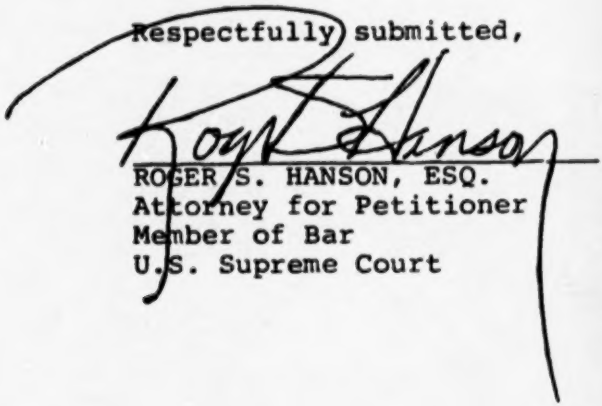
TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

JOSEPH M. SIVIGLIA, petitioner, by his counsel, ROGER S. HANSON, seeks Certiorari to the United States Court of Appeals, Tenth Circuit, en banc, published decision

entered June 23, 1982.

Dated: October 31 , 1982 at Santa Ana, California.

Respectfully submitted,



ROGER S. HANSON, ESQ.
Attorney for Petitioner
Member of Bar
U.S. Supreme Court

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(d) The initial decision of the U.S. Court of Appeals (3 Judge panel) is reported as United States v. Siviglia, ___F.2d___ (10th Cir. 1982) and the En Banc opinion is reported as United States v. Siviglia, ____F.2d ____, (10th Cir. 1982 En Banc).

(e) Grounds for Jurisdiction of this Court:

(i) Date of Panel opinion (Judges Seth, Barrett and McKay: June 15, 1981

Date of En Banc Opinion (Judges Seth, McWilliams, Barrett, Doyle, McKay, Seymour; dissents by Judges Holloway and Logan:
June 23, 1982

(ii) A petition for rehearing En Banc was made and denied on September 10, 1982 .

(iii) Does not apply.

(iv) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. 2354(1).

(f) United States Constitutional Provisions involved:

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time or War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been

previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

FEDERAL RULE CRIMINAL PROCEDURE 33

The Court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such

further time as the court may fix during the 7-day period. (As amended Feb. 28, 1966, eff. July 1, 1966).

(g) Concise statement of the Case with facts material to consideration of the questions presented:

Petitioner Joseph M. Siviglia was charged with counts of 18 U.S.C. 371, conspiracy to transport, receive and conceal stolen motor vehicles; 18 U.S.C. 2313 and 2, transporting stolen motor vehicles; 18 U.S.C. 2313, receiving stolen vehicles, in the United States District Court in the District of New Mexico. Following jury trial, petitioner was acquitted of one count and convicted of the other counts. On appeal to the U.S. 10th Circuit, a panel of that circuit reversed the conviction on June 5, 1978 in an unpublished opinion for gross prejudicial misconduct on the part of the Assistant United States Attorney during closing argument.

Petitioner was retried on said charges,

was reconvicted, and took a second appeal to the U.S. 10th Circuit. While that appeal was pending, counsel on appeal desired to file a Motion for a New Trial under F.R.CRIM.P. 33 in the District Court in New Mexico. While a host of existing decisions (see e.g. United States v. Phillips, 558 U.S. 363 (6th Cir. 1977) and United States v. Fuentes-Lozano, 580 F.2d 734 (5th Cir. 1978) suggested that the acceptable and safe procedure to insure viability of the direct appeal at the circuit level, should an adverse result be obtained in the District Court on the Motion for a New Trial, would be to file the Motion to Remand Under Rule 33 in the District Court, appelate counsel filed it in the U.S. 10th Circuit.

On or about September 7, 1979, the U.S. 10th Circuit, acting solely by a single judge, granted the motion to remand to the U.S. District Court in Albuquerque.

Following an evidentiary hearing, the United States District Court denied the Motion

for a New Trial and a timely appeal from that denial was taken and filed as No. 79-2180.

Appellate counsel sought to return the direct appeal to the U.S. 10th Circuit for Hearing on the Merits in No. 79-1004, and the two appeals were consolidated for oral argument. While neither the Government nor appellant-petitioner raised the issue, a panel of the U.S. 10th Circuit ruled that it had permanently lost jurisdiction in cause No. 79-1004, the direct appeal on the merits from the conviction, because the remand sought and granted was unqualified, i.e., it was a permanent remand although the three-judge panel clearly admitted that it was quite apparent that appellate counsel for petitioner did not intend to abandon the direct appeal, and in effect had desired merely a temporary and qualified remand for the purposes of the Motion for New Trial under F.R.CRIM.P. 33. See page 19 of this petition for Rule 33; see Appendix "A" for the three-judge panel decision. In

effect, the U.S. 10th Circuit three-judge panel refused to rule on the merits of the appeal in cause No. 79-1004 because it had "permanently divested itself of jurisdiction" when it remanded the cause for the purposes of the Motion for a New Trial.

Petitioner sought a hearing En Banc and that hearing was granted; on or about June 23, 1982, voting 6-2, with Circuit Judges Holloway and Logan dissenting, the U.S. 10th Circuit En Banc embraced the analysis of the panel decision. See Appendix "B."

A Petition for Rehearing En Banc was made and denied on September 10, 1982. See Appendix "C."

The result of the U.S. 10th Circuit in United States v. Siviglia, ___ F.2d___ , (10th Cir. 1982) is at gross variance and is in conflict with all other known decisions of other Federal Circuit Courts of Appeal, and the conflict in the Circuits must cause this Honorable Court to grant Certiorari to resolve this

ambiguity in Federal criminal procedure which quite obviously is a serious and recurring national Federal criminal procedural issue under Rule 33, F.R.CRIM.P.

The case at bar, if it is allowed to stand, has denied this Petitioner his right to appeal his Federal criminal conviction and that result has been based on the alleged command of this Honorable Court in a Civil Case, Firestone Tire and Rubber Co. v. Risjord, 449 U.S. 368 , ____ L.Ed. 2d____, 101 S.Ct. 669, which was retroactively applied in this Federal Criminal Conviction.

Further, it is rather apparent that the loss of the direct appeal occurred solely as a result of appellate counsel failing to take cognizance of and to follow the manifold extant decisions which mandated the proper procedure to follow to insure continued viability of the pending appeal should the Motion for New Trial made under Rule 33 not be successful. This failure of appellate counsel to familiar-

ize himself with the non-deviating authority prescribing remand application to the U.S. District Court and not to the Circuit Court constitutes ineffective assistance of counsel recognized in a host of Federal Circuit Court opinions and also, of course, by this Honorable Court. See the cited cases in the Argument.

(i) Basis of Federal Jurisdiction:

Petitioner Siviglia was indicted by the United States Grand Jury for the District of New Mexico and was charged in U.S. District Court with violations of 18 U.S.C. 371, 18 U.S.C. 2312 and 2, and 18 U.S.C. 2313.

(j) ARGUMENT

PETITIONER SIVIGLIA WAS DENIED FEDERAL DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT AND THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL UNDER THE SIXTH AMENDMENT BY HIS APPELLATE COUNSEL MOVING THE CIRCUIT COURT FOR A REMAND, RATHER THAN THE DISTRICT COURT, IN ORDER TO MAKE A MOTION FOR A NEW TRIAL UNDER F.R.CRIM.P.33; ALTERNATELY, THE U.S. COURT OF APPEALS FOR THE 10TH CIRCUIT HAS CREATED PROCEDURAL LAW IN CONFLICT WITH ALL OTHER KNOWN DECISIONS OF THE FEDERAL CIRCUIT

COURTS WHICH HAVE RULEDON THIS PROCEDURAL ISSUE, AND HAS APPLIED IT RETROACTIVELY AGAINST PETITIONER TO DEPRIVE HIM OF A RESOLUTION OF HIS APPEAL ON THE MERITS FROM A FEDERAL CRIMINAL CONVICTION.

UNDER EXISTING LAW, E.G., UNITED STATES V. PHILLIPS, 558 F.2d 363, (6th CIR. 1977) AND UNITED STATES V. FUENTES-LOZANO, 580 F.2d. 724, (5th CIR. 1978) AN APPELLATE ATTORNEY CAN INSURE THE CONTINUED VIABILITY OF A FEDERAL CRIMINAL APPEAL BY FIRST AND ONLY MAKING APPLICATION TO THE U.S. DISTRICT COURT WHO HAS LIMITED JURISDICTION TO EITHER DENY THE MOTION WITHOUT SEEKING REMAND, OR IF THE DISTRICT JUDGE FINDS MERIT TO THE MOTION, HE CAN SEEK REMAND UNDER THE INTENTION TO GRANT THE MOTION FOR A NEW TRIAL.

IN THE CASE AT BAR, THE U.S. 10TH CIRCUIT HAS RULED THAT IT HAS PERMANENTLY LOST JURISDICTION TO FORECLOSE RESOLUTION OF THE DIRECT APPEAL BY APPELLATE COUNSEL INITIALLY SEEKING REMAND FROM THE CIRCUIT.

NO COMBINATION OF NEW RETROACTIVELY APPLIED PROCEDURAL DECISION OR COUNSEL INEFFECTIVENESS SHOULD EXIST TO DEPRIVE A FEDERAL APPELLANT HIS RIGHT TO APPEAL.

CONSEQUENTLY, CERTIORARI SHOULD BE GRANTED.

The case at bar presents, as far as is known, the first national requirement to interpret Federal Rule of Criminal Procedure 33, which provides:

FEDERAL RULE CRIMINAL PROCEDURE 33

The Court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdic or finding of guilty or within such 7-day period. (As amended Feb. 28, 1966, eff. July 1, 1966).

(a) The ineffective assistance of counsel issue.

Generally said, defense counsel holding themselves out to be qualified to handle Federal criminal appellate cases must be charged with knowledge of the leading decisions which would insure the continued viability of a pending Federal Appeal should they deem it necessary to seek a new trial based on newly discovered evidence under F.R.CRIM.P. 33 while the appeal is pending.

The manifold decisions in existence when appellate counsel moved to remand this appeal during its pendency in the U.S. 10th Circuit made it clear that the seeking of the remand from the District Judge would insure the continued life of the pending appeal should the District Judge, in exercising his limited jurisdiction to evaluate the new trial motion, deemed it non-meritorious. On the other hand, in failing to ask for a qualified and temporary remand for the sole purpose of evaluating the new trial motion, and

by seeking the remand from the 10th Circuit, appellate counsel placed the appeal in jeopardy and in effect abandoned it. When the Motion for New Trial was resolved adverse to petitioner, appellate counsel sought return to the 10th Circuite for resolution of the appeal in 79-1004 on the merits. Clearly, as the 10th Circuit has noted in its opinion, Appendix "B", appellate counsel did not intend to abandon the direct appeal, but really sought a limited and qualified remand for the purpose of the Motion for the New Trial under Rule 33.

Other Circuits (e.g. United States v. Phillips, 558 F.2d 363 (6th Cir. 1977)) have refused remand when the request is filed in the circuit, forcing the petitioner-appellant to go to the District Court; other Circuits, (e.g., United States v. Fuentes-Lozano, 580 F.2d 724, (5th Cir. 1978)) have provided that the motion for remand, if made in the Circuit, can be granted without permanently divesting itself of jurisdiction to entertain the merits of the

appeal when the motion for new trial is unsuccessful. The 5th Circuit thus sanctioned either an application first to the Circuit or first to the District Court, and did not anihilate the petitioner-appellant's appeal if the Rule 33 motion was proven to be non-meritorious. See United States v. Fuentes-Lozano, 600 F.2d 552 (5th Cir. 1979).

Thus alert Federal appellate counsel familiar with the foregoing cases, and a host of others, easily ascertained from United States Code Annotated, referenced to F.R.CRIM.P. 33 would have been aware of the pitfalls and shoals lurking beneath the uncharted waters of an initial unqualified remand motion filed with the Circuit.

The minimal mandates for counsel effectiveness has been spelled out in a host of decisions. The "farce, sham, and mockery" standard, of course, is no longer with us. Plainly counsel can miss an issue on appeal and not necessarily be "ineffective" but it goes without saying that

a mistake of procedure which causes a loss of the entire appeal where it is saliently clear that ample authority existed to teach one how to avoid that catastrophic result cannot be excused.

The En Banc 10th Circuit opinion cavalierly attempts to shunt aside current counsel's allegation and assertion of counsel ineffectiveness by a terse reference:

> "...That particular issue cannot be injected into the present proceeding in such offhand manner. Furthermore, there is nothing in the record to support the suggestion...' (Page B-7 , Appendix "B ", this petition)

Two comments are in order:

1. It was the U.S. 10th Circuit that "injected" the issue of "loss of jurisdiction" into the appeal; neither appellant nor respondent suggested such an epoch-making result and neither party briefed the issue nor was it even suggested by the 3-judge panel during oral argument in

the manner presented in the panel opinion; hence counsel could not, and did not, suggest counsel ineffectiveness because there was no such suggestion prior to the opinion of the panel that this result would be the fate of No. 79-1004;

2. Of course, the record could not possibly contain an evidentiary hearing looking into counsel ineffectiveness for the U.S. 10th Circuit developed this issue <u>itself</u> after all briefs were filed and the case orally argued on the merits, no one addressing the Court on the issue; all we suggest here is when the <u>entire right to appeal a Federal criminal conviction is emasculated</u> by appellate counsel failing to adhere to well established guidelines from other Circuits in Rule 33 procedures, that is much more than missing an issue in an appellate brief; it is akin to not filing the Notice of Appeal on time and thus causing total loss of the right of appeal, and how can this be excused by any sort of explanation in an evidentiary hearing? We suggest this is <u>Per Se</u> appellate counsel

ineffectiveness recognized in the following major decisions:

Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978 en banc); United States v. DeCoster, 159 U.S. App. D.C. 326, 330-31, 487 F.2d 1197, 1201-02 (D.C. Cir. 1973); Moore v. United States, 432 F.2d 730, 736-37, (3rd cir. 1970 en banc); Marzullo v. State of Maryland, 561 F.2d 540, 543-44 (4th Cir. 1977); Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974); United States ex. rel. Williams v. Twomey, 510 F.2d 634, 641 (7th Cir. 1974); and United States v. Easter, 539 F.2d 663, 665-66 (8th Cir. 1976).

Of course, this Honorable Court has long recognized that criminal defendants are entitled to the effective assistance of counsel: Gideon v. Wainwright, 372 U.S. 335, 339, 83 S.Ct. 792, 9L.Ed. 2d 799 (1963) overruling Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed 1595 (1942); and importantly, see McMann v. Richardson, 397

U.S. 759. 90S.Ct. 1441, 25 L.Ed. 2d 763 (1970), especially 397 U.S. at 771, 90 S.Ct. at 1449. The McMann decision mandated that "effective assistance" means assistance "within the range of competence demanded of attorneys in criminal cases."

All we here aver is that it is per se counsel ineffectiveness if the entire appeal is lost because of counsel not following existing case authority which clearly pointed out the proper way to seek a motion for a new trial during a pending appeal and not place that pending appeal in jeopardy. Certiorari should therefore be granted to set standards for appellate counsel on Federal criminal appeals.

(b) The conflict of authority in the U.S. Circuit Court.

The instant En Banc opinion of the U.S. 10th Circuit holding that initial application for remand made in and granted by the direct Circuit annihilates the direct appeal is at

variance with all other leading circuit court opinions. See United States v. Phillips, 558 F.2d 363 (6th Cir. 1977) requiring the Circuit to deny without prejudice such an application and directing that the application be made first to the District Judge, who would seek the remand if, and only if, he found merit to the motion for a new trial; United States v. Fuentes-Lozano, 580 F.2d 724 (5th Cir. 1978), allowing the Circuit to reassume jurisdiction of the direct appeal should the District Judge deny the motion for a new trial. (See the subsequent resolution of that direct appeal in United States v. Fuentes-Lozano, 600 F.2d 552 (5th Cir. 1979). See the following cases which provide that the motion for a new trial should be made, in the first instance, to the District Court: United States v. Lowell, 649 F.2d 950, 967 (3rd Cir.); United States v. Frame, 454 F.2d 1136, 1138 (9th Cir.), cert. den. 406 U.S. 925; Knight v. United States, 213 F.2d 669, 702 (5th Cir.); Zamloch

v. United States, 187 F.2d 854, 855-56 (9th Cir.); and see 2 Wright, Federal Practice and Procedure, Sec. 557, pp. 534-535.

A gross conflict in the Federal circuits on a serious and consequential Federal procedural issue that is intertwined with counsel ineffectiveness provides ample reason for this Honorable Court to grant Certiorari to resolve the conflict.

Thus, certiorori is prayed for to resolve this gross conflict of interpretation of F.R. CRIM.P. 33 in the U.S. Circuit Courts.

This aberrent En Banc decision of the U.S. 10th Circuit must not be allowed to stand.

(c) The error in "retroactivity" and the erroneous use of Firestone Tire and Rubber Co. v. Risjord, 449 U.S. 368, a civil case.

The U.S. 10th Circuit voted 6-2 En Banc that petitioner's direct appeal was forever lost because the Petition for Removal had been made to the Circuit and not to the District Judge, citing as basis for its loss of juris-

diction Firestone Tire and Rubber Co. v. Risjord, 449 U.S. 368; as the two-man dissent (U.S. Circuit Judges Holloway and Logan) points out at B-18, Appendix, of this Petition, Firestone is inapposite to the procedural issue here presented, and the other cases embraced by the majority similarly fail to support the anomalous result of causing loss of the direct criminal appeal. See, in toto, the dissent at pages B-9 through B-23, Appendix.

(1) Conclusions.

Because of the need to resolve (1) a serious conflict in the U.S. Circuit Courts on the interpretation of F.R.CRIM. P. 33, and (2) to define the minimal effective assistance of counsel standards for attorneys handling Federal criminal appeals, Certiorori should be granted to the United States Court of Appeals for the 10th Circuit in Denver, Colorado.

Respectfully submitted,

Roger S. Hanson, Esquire
Attorney for Petitioner
Member of Bar,
U.S. Supreme Court

(k.) APPENDIX

"A" - Opinion of 3-Judge Panel, U.S. 10th Circuit, entered June 15, 1981.

"B" - En Banc Opinion of U.S. 10th Circuit, together with Dissenting Opinions, entered June 23, 1982.

"C" - Order Denying Rehearing, entered September 10, 1982

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	Nos. 79-1004
	)	and 79-2180
vs.	)	
	)	
JOSEPH A. SIVIGLIA,	)	
	)	
Defendant-Appellant.	)	

Appeal From the United States District Court
For the District of New Mexico
(D.C. No. 76-31 Criminal)

Hank Farrah of Hank Farrah and Associates (Robert N. Singer and W. John Brennan of Coors, Singer, Anaha, Brennan & Stratton, with him on the briefs), Albuquerque, New Mexico, For Defendant-Appellant.

Don J. Svet, Assistant United States Attorney (R.E. Thompson, United States Attorney, and Richard J. Smith, Assistant United States Attorney, with him on the briefs), Albuquerque, New Mexico, for Plaintiff-Appellee.

Before SETH, Chief Judge, BARRETT and McKAY, Circuit Judges.

BARRETT, Circuit Judge.

Joseph Siviglia (Siviglia) appeals his jury conviction, following retrial, of one charge of conspiracy to transport, receive and conceal stolen motor vehicles in violation of 18 U.S.C.A. § 371, three charges of transporting stolen motor vehicles in violation of 18 U.S.C.A. §§ 2313 and 2, and two charges of receiving stolen vehicles in violation of U.S.C.A. § 2313. The second trial commenced on September 18, 1978. The jury verdict of guilty on all counts was returned on the tenth day of trial.

Litigative and Procedural Background

Siviglia was convicted in 1976 following his first trial which lasted approximately ten days. He was charged identically there with the charges (counts) upon which he was convicted as above related at his retrial. Siviglia was originally tried jointly with Jeff Ralph Caruthers, Donnie Clay Shafer and Ronald McIntyre for conspiracy to transport motor vehicles and the receipt and possession of same in violation of U.S.C.A. § 2312 and 371. Each case was consolidated

upon appeal, resulting in this court's unpublished opinion entitled United States of America v. Jeff Ralph Caruthers, Donnie Clay Shafer, Ronald McIntyre, and Joseph A. Siviglia, Nos. 76-1911, 76-1912, 76-1913 and 76-1914 (10th Cir., filed June 5, 1978), hereinafter referred to as slip opinion. The convictions of Caruthers, Shafer and McIntyre were affirmed. This court reversed and remanded for a new trial as to Siviglia, holding that certain comments made by the prosecutor in the course of closing arguments:

> . . . constituted gross prosecutorial misconduct requiring reversal of Siviglia's conviction, even though no trial objection was lodged. The statements constituted plain error affecting substantial rights. Fed. Rules Cr. Proc. rule 52(b), 18 U.S.C.A. The prosecutor did, by these remarks, divert the trial and the attention of the jury to a trial of Siviglia's attorney. If the witness Trower did lie, it was a matter for the jury to consider in deciding the case. The jury was not called upon to decide who, if anyone, asked him to lie. This was a collateral matter. Thus, the prosecutor's statement was both personal and vindictive, directed to Siviglia's attorney, and for all practical purposes to Siviglia. Why Trower lied, if he did, had nothing to do with the guilt or innocence of Siviglia.
>
> [Slip opinion, p. 33; Barrett, Circuit Judge, dissenting].

Siviglia does not challenge the sufficiency of evidence on appeal from his conviction on retrial. His challenges involve claimed trial court errors. We need not enumerate them, however, inasmuch as the jurisdictional issue is dispositive.

Following Siviglia's conviction on retrial, he appealed here in United States v. Siviglia, No. 79-1004. During the pendency of that appeal, and subsequent* to its disposition on the merits, Siviglia filed a motion with this court to remand to the District Court for consideration of his motion for grant of a new trial based on alleged newly discovered evidence. This court granted the remand on September 7, 1979

Thereafter, on October 15, 1979, the District Court denied Siviglia's motion for a new trial based on newly discovered evidence. A timely appeal was taken by Siviglia from that denial on October 24, 1979, and docketed here as United States v. Siviglia, No. 79-2180.

On October 25, 1979, Siviglia filed an amended notice of appeal incorporating the substantive

* (sic) - obviously the Court here means "prior."

issues he raised in Case No. 79-1004 prior to its remand with his challenge to the District Court's denial of his motion for new trial. We hereby recall the mandate in Case No. 79-1004. This opinion is issued under consolidated dockets Nos. 79-1004 and 79-2180.

. . Our Jurisdiction

Notwithstanding the fact that neither party has raised the issue of this court's jurisdiction to hear this consolidated appeal, jurisdictional questions are of primary consideration and can be raised at any time by courts on their own motion. McGrath v. Kristensen, 340 U.S. 162 (1950); First State Bank, etc. v. Sand Springs State Bank, 528 F.2d 350 (10th Cir. 1976); Bledsoe v. Wirtz, 384 F.2d 767 (10th Cir. 1967). Lack of jurisdiction cannot be waived and jurisdiction cannot be conferred upon a federal court by consent, inaction or stipulation. California v. LaRue, 409 U.S. 109 (1972); Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968). "If the parties do not raise the question of lack of jurisdiction, it is the duty of the federal court to determine the matter sua sponte." Basso v.

Utah Power and Light Company, 495 F.2d 906, 909 (10th Cir. 1974). A court lacking jurisdiction cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking. Mitchell v. Maurer, 293 U.S. 237 (1934); Citizens Concerned, Etc. v. City and County of Denver, 628 F.2d 1289 (10th Cir. 1980).

It is clear that the issue raised in Siviglia's Case No. 79-2180, i.e., whether the trial court, following his conviction on retrial, abused its discretion in denying his motion for dismissal or for a new trial based upon newly discovered evidence, is properly before this court. We hold that this contention is wholly without merit. The record establishes that Siviglia could have readily ascertained the existence of the alleged newly discovered evidence with the exercise of due diligence. It is our view that the so-called newly discovered evidence would not have altered the result of the jury decision relative to his guilt.

We move now to consideration of the threshhold question whether this court is vested with jurisdiction of the issues presented by Siviglia in his direct appeal in Case No. 79-1004. He there contends that, upon retrial, the District Court erred in that: (a) retrial after reversal for prosecutorial misconduct violated the double jeopardy clause of the Fifth Amendment; (2) in denying him a continuance to present evidence impeaching one of the Government's key witnesses or showing the Government's knowledge of same; (3) he was denied his constitutional right to a speedy trial; and (4) sentencing him for transporting and receiving the same vehicle. For reasons hereinafter set forth, we hold that we do not have jurisdiction to decide these appellate contentions. The appeal must be dismissed.

It is settled that under Fed. Rules Cr. Proc. rule 33, 18 U.S.C.A., a district court may entertain a motion for a new trial during the pendency of an appeal, although the motion may not be granted until a remand request has been

granted by the appellate court. United States v. Wilson and Abernathy, Unpublished Nos. 79-2142 and 79-2151 (10th Cir., filed June 4, 1980); United States v. Ellison, 557 F.2d 128 (7th Cir. 1977), cert. denied, 434 U.S. 965 (1977); United States v. Frame, 454 F.2d 1136 (9th Cir. 1972), cert. denied, 406 U.S. 925 (1972); Ferina v. United States, 302 F.2d 95 (8th Cir. 1962), cert. denied, 371 U.S. 819 (1962).

A difficult question concerns the problem of a remand motion made prior to the district court's consideration of the motion for new trial. In United States v. Phillips, 558 F. 2d 363 (6th Cir. 1977), the appellant's motion for new trial was denied on the ground the proper procedure requires that the motion for new trial be first filed in the district court. The court, however, denied the remand motion without prejudice to resubmission in the event the district court certified its intention to grant the new trial. Thus, the court effectively circumvented the instant problem by refusing to entertain a

remand motion unless (1) a motion for new trial is first made in the district court, and (2) the district court certifies its intention to grant the motion.

Faced with a similar circumstance, the court in United States v. Fuentes-Lozano, 580 F.2d 724 (5th Cir. 1978), treated a motion for a temporary remand for the purpose of lodging a motion for new trial in the district court as an unqualified motion for remand. The motion was granted. The court upheld the propriety of the district court entertaining a motion for new trial before remand in accordance with the general rule, while at the same time sanctioning the alternative procedure of first seeking a remand to avoid delay for the purpose of permitting the district court to "fully entertain the motion." Fuentes-Lozano, supra, does not, however, discuss the ramifications of an unconditional remand in relation to a subsequent appeal on the merits. Even so, the court subsequently accepted and decided an appeal on

the merits following the district court's apparent denial of the motion for new trial. See United States v. Fuentes-Lozano, 600 F.2d 552 (5th Cir. 1979). The jurisdictional basis for subsequent review of the case on the merits cannot be clearly ascertained.

Thus, in one case the appellate court, in United States v. Phillips, supra, expressed its policy of dismissing such a motion unless the district court first certifies its intent to grant a new trial, while the court, in United States v. Fuentes-Lozano, supra, granted the motion in the interests of expediency. We observe that these alternatives are not mutually exclusive nor do they exhaust all possibilities, i.e., temporary or limited remand.

In the case at bar an unconditional remand motion was requested and granted prior to the District Court's entertainment of the motion for a new trial. Ordinarily, an unconditional remand contemplates termination of jurisdiction. See e.g., Three J Farms, Inc. v. Alton Box

Board Co., 609 F.2d 112, 115 (4th Cir. 1979) cert. denied, 445 U.S. 911 (1980); International Union, United Mine Workers of America, Dist. 17 and 28 v. N.L.R.B., 468 F.2d 1139, 1142 (D.C. Cir., 1972).

It seems absolutely clear, in the instant case, that Siviglia did not intend that his remand motion made in No. 79-1004 foreclose his future appeal on the merits. That was, however, the effect of the unconditional remand order. Our research indicates that this court has not heretofore expressed its policy with respect to such a situation. We need not be concerned further about the matter, however. The United States Supreme Court recently and definitively resolved the matter.

In Firestone Tire & Rubber Co. v. Risjord, ___ U.S. ___, 101 S.Ct. 669 (January 13, 1982), the Court held:

. . . the finality requirement embodied

> in § 1291 is jurisdictional in nature. If the appellate court finds that the order from which a party seeks to appeal does not fall within the statute, its inquiry is over. A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only. We therefore hold that because the Court of Appeals was without jurisdiction to hear the appeal, it was without authority to decide the merits.
>
> Slip Opinion, p. 11 [Footnote omitted].

Firestone is dispositive. It rejected the rationale of those courts which have made their non-appealability decisions prospective only in order to reach the merits of the disputes before them. The Firestone opinion, in recognition of the "scarce judicial resources", refused to broaden the scope of the finality rule.

We affirm in Case No. 79-2180. We dismiss the appeal in Case No. 79-1004.

UNITED STATES COURT OF APPEALS

For the Tenth Circuit

SLIP OPINION

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Nos. 79-1004 and 79-2180

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	Appeal from the United States District Court for the District of New Mexico (D.C. No. 76-31-Criminal)
v.	)	
JOSEPH A. SIVIGLIA, Defendant-Appellant.	)	

ON REHEARING EN BANC

Don J. Svet, First Assistant United States Attorney (William L. Lutz, United States Attorney, with him on the brief), Albuquerque, New Mexico, for Plaintiff-Appellee.

Roger S. Hanson, Santa Ana, California, for Defendant-Appellant.

Before Chief Judge, HOLLOWAY, McWILLIAMS, BARRETT, DOYLE, McKAY, LOGAN and SEYMOUR, Circuit Judges.

Per Curiam.

A three-judge panel of this Court filed its opinion in these two appeals on June 15, 1981. 28 U.S.C. § 46 (1976). The three-judge panel affirmed the judgment of the district court in No. 79-2180 and dismissed the appeal in No. 79-1004. On June 29, 1981, Siviglia, the appellant in both cases, filed a petition for rehearing, with the suggestion that both appeals be reheard en banc. On August 18, 1981, this Court granted Siviglia's petition for rehearing en banc. The opinion of the panel, filed on June 15, 1981, had not been withdrawn. Thereafter, the parties were permitted to file supplemental briefs, and the cases were reargued to the Court, sitting en banc, on May 6, 1982.

No. 79-2180

Although a rehearing en banc was granted in each of these two appeals, the supplemental briefs and the oral argument of counsel related only to No. 79-1004. As indicated, in No. 79-2180, the panel affirmed the orderof the district court denying Siviglia's motion for dismissal or a new trial. On rehearing en banc,

the Court adheres to the judgment of the panel in No. 79-2180, and affirms the order of the districtcourt.

No. 79-1004

The supplemental briefs and the oral argument were concerned exclusively with No. 79-1004. In No. 79-1004, the panel dismissed the appeal on the ground that an earlier remand order divested the Court of jurisdiction to consider the merits of the appeal. On rehearing en banc of No. 79-1004, theCourt adheres to the order of the panel dismissing the appeal.

For background material, the reader of this opinion is directed to the opinion of the panel. United States v. Siviglia, ____F.2d ____ (10th Cir. 1981). It is sufficient for our present purposes simply to note that on August 27, 1979, Siviglia, through counsel, filed a motion to remand his case to the district court. As of that date, the appeal had been fully briefed, and the case was set for oral argument in the September, 1979, term of court. On August 31,

1979, the government filed a response to the motion to remand, in which the government objected to a remand on the ground thatit was a delaying tactic. On September 7, 1979, the Court granted Siviglia's motion for remand. Our remand order was an unqualified remand, i.e., not a partial remand, and contained no conditions or limiting language. The panel, in dismissing No. 79-1004, held that the unqualified remand order terminated our jurisdiction of that appeal. The Court, on rehearing en banc, adheres to the panel's order of dismissal in No. 79-1004.

The Court notes that Siviglia's motion to remand was itself "unqualified" in nature in that he did not request a partial remand for a limited purpose. In his motion to remand, Siviglia stated that he intended to file with the district court a motion for dismissal, or, alternatively, for a new trial, and that a remand was necessary in order to permit the district court to consider, and to grant such motion. Fed. R. Crim. P. 33. In the motion for remand, Siviglia declared that

if the district court were to grant his motion for dismissal, or new trial, further prosecution of the direct appeal, No. 79-1004, would be unnecessary. Significantly, Siviglia further declared that should the district court deny his motion for dismissal or new trial, he would then appeal "such denial." After remand, Siviglia in fact did file a motion for dismissal, or for a new trial, which the district court, after hearing, denied. As above indicated, we have affirmed such denial in No. 79-2180.

We find nothing in Siviglia's motion to remand to indicate that he sought only a partial or limited remand in order to preserve the direct appeal of his conviction should the district court deny his motion fordismisaal or new trial. On the contrary, Siviglia advised the Court in his motion to remand that should the district court deny his motion for dismissal or new trial, he intended to appeal "such denial," which he did. Accordingly, the motion for remand, in practical effect, constituted an abandonment

of any appeal going to the merits of his conviction. In this connection, our examination of Siviglia's brief addressing the merits of his second conviction indicate quite clearly that his grounds for reversal are unsubstantial. So, the motion for remand indicated, to us, that Siviglia was staking all on his ability to convince the district court that the charges against him should either be dismissed, or thathe should be granted a new trial thereon, or, absent that, a reversal on appeal of any such denial order.

By supplemental brief, current counsel for Siviglia, who did not prepare the motion for remand or otherwise actively represent Siviglia until the rehearing en banc, suggests that Siviglia has been denied his Sixth Amendment right to the effective assistance of counsel. That particular issue cannot be injected into the present proceeding in such offhand manner. Furthermore, there is nothing in the record to support the suggestion.

In sum, this Court had jurisdiction over

Siviglia's direct appeal of his criminal conviction in No. 79-1004 until September 7, 1979, on which date we granted defendant's unqualified motion to remand to the district court. Our unqualified remand of the case operated to divest us of jurisdiction. See Dist. 17 and 28, UMW v. NLRB, 468 F.2d 1139, 1142 (D.C. Cir. 1972). Having lost jurisdiction, we could not regain it until a proper appeal had been perfected. Siviglia's attempt to revive No. 79-1004 was untimely and, as such, cannot constitute a proper appeal. Accordingly, No. 79-1004 must be dismissed for want of jurisdiction.

Judge Holloway and Judge Logan dissent, and a dissenting opinion, or dissenting opinions, will be filed.

TO: ALL RECIPIENTS OF THE OPINION FILED JUNE 23, 1982

RE: Nos. 79-1004 and 79-2180
United States of America vs.
Joseph A. Siviglia

Attached is an opinion filed today by Circuit Judges William J. Holloway, Jr., and James K. Logan, dissenting and concurring in the opinion filed June 23, 1982.

HOWARD K. PHILLIPS,
Clerk

HOLLOWAY, Circuit Judge, with whom LOGAN, Circuit Judge, joins, concurring and dissenting.

I am in agreement with the result reached by the majority's opinions[1] in No. 79-2180, affirming the district court's denial of Siviglia's motion for dismissal or a new trial.[2] However, I cannot agree with the majority's ruling in No. 79-1004 that we are without jurisdiction to hear the merits of that original appeal because of an earlier order of remand entered to permit filing and consideration of the motion to dismiss or for a new trial.

The effect of the majority ruling in No.

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[1] The panel's opinion in the instant case, United States v. Siviglia, ___ F.2d ___ (10th Cir.), will hereinafter be referred to as Siviglia I while the court's subsequent en banc opinion, United States v. Siviglia, ___ F.2d ___ (10th Cir.), will be referred to as Siviglia II.

[2] I am persuaded that the record supports the district court's finding that it was not shown that the newly discovered evidence in question could not have been obtained in the first trial.

79-1004 is to dismiss Siviglia's original pending appeal without any consideration ever being given to the merits of the issues raised by thatappeal of right. No sound reason for such a harsh result is given. First, the majority points to no criminal rule nor to any rule or decision of this court holding that after denial of the motions by the district court, consideration of the original appeal would be foreclosed unless the motion to remand were technically worded so as to avoid seeking an "unconditional" or "unqualified" remand, as the Siviglia I and II opinions state. Second, Siviglia's motion to remand, made so that his motions to dismiss or for a new trial could be filed and considered by the district court, can in no way be read as intending to ask for a dismissal or outright abandonment of his original appeal. Thus applying this new procedural rule, now adopted, to Siviglia's August 1979 motion to remand unjustly defeats consideration of a criminal appeal on its merits.

First, neither the Federal Rules of Appellate Procedure, the Federal Rules of Criminal Procedure, nor the rules of Court for the Tenth Circuit specify that to preserve the pending appeal, a motion must be made for a "conditional" or "qualified" remand, as now required by the majority. Moreover, the procedure for such a motion is not clearly staked out. As this court noted in Siviglia I, under Fed.R.Crim.P. 33 a federal district court may properly entertain a new trial motion based on newly discovered evidence during the pendency of an appeal. However, the motion may be granted only on remand of the case. Id., ___F.2d___. Rule 33 does not indicate that initial application should not be made in the appellate court for leave to file the motion in the district court.[3]

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[3] A number of Circuits have indicated that the motion for a new trial should be made, in the first instance, to the district court. See. e.g. United States v. Lowell, 649 F.2d 950, 967 (3d Cir.); United States v. Frame, 454 F.2d 1136, 1138 (9th Cir.), cert. denied, 406 U.S. 925; Knight v. United States, 213 F.2d 699 , 702 (5th Cir.); Zamloch v. United States, 187 F.2d 854, 855-56 (9th Cir.); accord, United States

(Fn. 3 continued to next page)

(Fn. 3 continued)

v. Aguillar, 387 F.2d 625, 626 (2d Cir.); and see 2 Wright Federal Practice and Procedure, §557, pp. 534-35. Our Tenth Circuit opinions and rules have not stated that view.

Thus, though Siviglia's difficulty might have been circumvented by presenting his motion directly to the district court, see, e.g., United States v. Hays, 454 F.2d 274, 275 (9th Cir.), our decisions did not require that he should do so. See our own precedent in Heald v. United States, 175 F.2d 878, 883-84 (10th Cir.), cert. denied, 338 U.S. 859 and United States v. Fuentes-Lozano, 580 F.2d 724, 726 (5th Cir.). "The purpose of the provision of Rule 33, which permits the hearing, but not the granting of the motion, in a case in which an appeal has been taken, is to expedite proceedings." Rakes v. United States, 163 F.2d 771, 772 (4th Cir.). Indeed, it has been said that "as here, to avoid delay, the appellant may seek [from the court of appeals] a remand for the purpose of permitting the district court fully to entertain the motion." United States v. Fuentes-Lozana, supra, 580 F.2d at 726.

In short, I find that the various rules provided no mandatory sequence for the proper procedural steps in such circumstances. Indeed, if this court had adopted the procedure indicated in some circuits, (see n.3, supra), it would have denied the motion to remand and directed that the Rule 33 motion be filed in the district court, thus preserving the merits of Siviglia's appeal.[4] Most importantly, I find no authority dictating the harsh result of treating Siviglia's original appeal as abandoned upon the granting of his motion to remand.

Second, I must dissent because we cannot construe Siviglia's motion to remand as intending to dismiss his original appeal. We cannot reasonably impute to his motion for remand an intent to abandon completely his appeal in No. 79-1004 and to pin all his hopes on persuading

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[4] The appeal could then be held in abeyance until the trial judge certified to this court whether he would grant or deny the motion for new trial. See United States v. Smith, 331 F.2d 145, 146 (6th Cir.)

the district court to grant a new trial on newly discovered evidence. Such an interpretation of Siviglia's motion is unjustified.[5]

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[5] Siviglia's motion read in pertinent part as follows:

MOTION TO REMAND

Comes now Defendant-Appellant Joseph A. Siviglia, by andt hrough his attorney of record, Hank Farrah, and respectfully moves this Court to remand to the District Court for the District of New Mexico the above-styled cause. As grounds therefore Defendant-Appellant would show the Court the following:

1.) That Defendant-Appellant intends to file in the District Court a Motion for Dismissal of Charges or in the alternative for a New Trial, a copy of which is attached hereto, Labeled "Exhibit A", and incorporated herein by reference. The basis for such motion is newly discovered evidence as more fully explained in the Motion itself.

2.) If the District Court forthe District of New Mexico were to grant Defendant-Appellant's Motion for Dismissal, this Appeal would be unnecessary. However, if the District Court for the District of New Mexico denied Defendant-Appellant's Motion for Dismissal, Defendant-Appellant would appeal such denial. Thus it would be expeditious and economical in terms of judicial time and expense if the above-styled appeal were Remanded to permit consideration of Defendant-Appellant's

(Fn. 5 continued on next page)

(Fn. 5 continued)

Motion for dismissal in the Court below.

Defendant-Appellant has sought concurrence of counsel for the United States in this motion and concurrence has been denied.

Respectfully submitted,

.....

A motion to remand, even when not worded as a request for a "conditional" or "limited" remand, is no more than a motion to remand. Yet, in effect, the majority has treated Siviglia's motion as a motion to dismiss his appeal. See Fed. R. App.P. 43(b). The Siviglia II opinion says that Siviglia's motion stated that if the new trial were granted, further prosecution of the appeal in No. 79-1004 would be unnecessary and that Siviglia further said if the motion were denied, he would appeal that denial. The inference is drawn that he intended not to also pursue his original appeal if the new trial were denied. The inference is unjustified, in my judgment, and we should not infer such an intent without a clear basis. In fact, in Siviglia I, the panel earlier concluded (slip op. at 8, ___ F.2d___):

> It seems absolutely clear, in the instant case, that Siviglia did not intend that his remand motion made in No. 79-1004 foreclose his future appeal on the merits. That was, however, the

effect of the unconditional remand order. (Emphasis added).

I would not infer that Siviglia intended to foreclose pursuing the merits of his appeal in No. 79-1004 and would not hold that the remand order compels that result.

The authorities relied on by the majority do not support this harsh result. Siviglia I cites Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, a civil case. There the Supreme Court vacated a judgment of the Eighth Circuit, 312 F.2d 377, and held that the court of appeals had improperly reached the merits of an order denying a motion to disqualify an attorney, which the Court held not to be a final decision as required by 28 U.S.C. §1291. We are not construing §1291 and the finality rule. In 79-1004, Siviglia perfected an appeal from a final judgment in the district court. That judgment has been neither vacated nor reviewed in any manner and the appeal therefrom remains to be considered on its merits. Moreover, the reliance of

Siviglia I on the statement in Firestone that "a jursidictional ruling may never be made prospective only" is unpersuasive; the rule adopted by the majority here is itself unsound and is not supported by principles of retrospective or prospective application.

The opinions also cite International Union, United Mine Workers of America, Dist. 17 and 28 v. N.L.R.B., 468 F.2d 1139 (D.C. Cir.) and Three J Farms, Inc. v. Alton Box Board Co. 609 F.2d 112 (4th Cir.), cert. denied, 445 U.S. 911 as support for their holding. In International Union, another civil case, the court of appeals had remanded, apparently without a motion from either party, to the Board. The Board conducted hearings and subsequently the court of appeals, sua sponte, ordered the case consolidated with another case for review. At that point, the court's jurisdiction was challenged and the court stated that, as a result of the "unqualified" remand, the court was divested of jurisdiction. However, the court noted that

there had been a new Board order dismissing the complaint and thatno aggrieved party had yet appealed that new order. The case is thus unlike Siviglia's case where the judgment of conviction has not been disturbed, the original appeal from it isnot disposed of, and the purpose of the remand has been served by the ruling on the motions in the district court so that appellate jurisdiction can again be exercised.

Three J. Farms, still another civil case, is also inapposite. There, the case was removed to the federal court and subsequently it remanded to the state court, which resulted in the federal district court's loss of jurisdiction. The finality of such transfer of jurisdiction between court systems was indicated by 28 U.S.C. §1447(d) which directs that "[a]n order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise . . . ." But cf. Thermtron Products, Inc. v. Hermansdorfer., 423 U.S. 336, 345-46. This statute furthers expeditious

procedure as well as " . . .respect for the state court and . . . recognition of principles of comity." In re La Providencia Development Corporation, 406 F.2d 251, 252 (1st Cir.). We are not concerned with those policies as between the federal and state court systems in the instant criminal case, nor are we guided by such a statute.

I would hold that the order granting Siviglia's motion to remand resulted not in abandonment of the original appeal, but merely in remand of the case to the district court to permit it to rule on the motion to dismiss or for a new trial.[6] After that motion was disposed of - here by a denial - I would hold that it is in order for us to proceed to disposition of the merits of the original appeal, after notification of the district court's ruling. See United States v. Fuentes-Lozano, 600 F.2d 552 (5th Cir.)(previously "remanded

[6] The orderof remand was entered on September 7, 1979, by a single Circuit Judge of this court, the order stating that:
(Fn. 6 continued to next page)

(Fn. 6 continued)

This matter comes on for consideration of appellant's motion to remand the captioned cause to the United States District Court for the District of New Mexico for the purpose of permitting the appellant to file with said court a motion for dismissal of the charges or, in the alternative, for a new trial.

Upon consideration whereof, appellant's motion is granted.

The captioned case is vacated from this Court's September Calendar on Friday, September 14, 1979, and counsel are excused from attendance at that time.

It is further ordered that the cause is remanded to the United States District Court for the District of New Mexico.

The Clerk shall certify a copy of this order to the said court as and for the mandate.

to permit the filing and consideration of the proposed motion [for a new trial]" at 580 F.2d 726). After the purpose of the remand has been served, there is no impediment to our re-exercising jurisdiction to decide the case. The procedure in Fuentes-Lozano is parallel to what happened in the instant case, as the wording of the remand order here shows. (See note 6). After disposition of the motion for a new trial in Fuentes-Lozano, the court of appeals decided the merits of the original appeal under the same docket number. 600 F.2d at 553. The original appeal in the main case and the appeal from an order denying a motion for new trial may be consolidated. See United States v. Butler, 636 F.2d 727, 729 n.**(D.C.Cir.), cert. denied, 451 U.S. 1019; United States v. Hays, 454 F.2d 274, 275 (9th Cir.).

Procedural rules should be construed to favor hearing criminal appeals on their merits, and not in a technical way which frustrates the statutory right of appeal. For these reasons I must dissent from the refusal to consider the merits in No. 79-1004.

JULY TERM - September 10, 1982

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JOSEPH A. SIVIGLIA, Defendant-Appellant.	Nos. 79-1004 79-2180 (D.C. No. CR 76-031)

This matter comes on for consideration of appellant's petition for rehearing en banc filed in the captioned cases or in the alternative, a motion for allowance of bail pending petition for certiorari to the Supreme Court of the United States. The government filed a response to the petition.

Upon consideration whereof, no judge in regular active service on the Court having re-

quested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the petition for rehearing en banc is denied.

It is further ordered that appellant's request for allowance of bail pending petition for certiorari is granted upon the following conditions:

a. Appellant shall file a ten thousand dollar ($10,000) cash or corporate surety bond with the clerk of the United States Court for the District of New Mexico on or before October 1, 1982.

b. The clerk of the district court shall notify the clerk of this Court when such bond is filed.

c. If the bond is not filed with the clerk of the district court by October 1, 1982, then the mandate in case number 79-2180 shall issue forthwith (mandate issued in 79-1004, June 25, 1982).

HOWARD K. PHILLIPS, Clerk

By: (Sig.)
Robert L. Hoecker
Chief Deputy Clerk

(m.) Declaration of Attorney

Member of Bar of U. S. Supreme Court

Re Filing/Service of Petition for Certiorari

State of California)
) SS.
County of Orange)

Roger S. Hanson declares:

1. I am a member of the Bar of the United States Supreme Court.

2. On November 9, 1982, I caused to be deposited in the U. S. Mail in Ft. Worth, Texas, copies of the Petition for certiorari in Joseph Siviglia v. United States as follows:

(a.) Forty printed copies together with Two Hundred Dollars ($200.00) filing fee addressed to Clerk of U.S. Supreme Court, Washington, D. C. 20543;

(b.) Three printed copies to U. S. Solicitor General, Washington, D. C. 20543;

(c.) One copy to Don Svet, Asst. U. S. Attorney, U.S. Court House, Albuquerque, New Mexico 87103;

(d.) One copy to U.S. Court of Appeals, Office of Clerk, U.S. 10th Circuit Room C-404, U.S. Court House, Denver, Colorado 80294.

(e.) One copy to Jesse Casaus, Clerk U.S. District Court, Albuquerque, New Mexico 87103.

I declare the foregoing to be true and correct under the penalty of perjury.

Roger S. Hanson, Esquire
Member of the Bar of the
United States Supreme Court

No. 82-1130

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH M. SIVIGLIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOHN F. DE PUE
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QUESTION PRESENTED

Whether the court of appeals correctly held that an "unqualified" motion for a remand to the district court, made for the purpose of presenting a motion for a new trial under Fed. R. Crim. P. 33, operated as an abandonment of petitioner's direct appeal from his conviction and divested the court of appeals of jurisdiction to hear the direct appeal following the district court's denial of petitioner's motion for a new trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1130

JOSEPH M. SIVIGLIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the panel of the court of appeals (Pet. App. A-1 to A-12) and the en banc court (Pet. App. B-1 to B-23) are reported at 686 F.2d 832.

JURISDICTION

The judgment of the court of appeals sitting en banc was entered on June 23, 1982. A second petition for rehearing was denied on September 10, 1982 (Pet. App. C-1 to C-2). The petition for a writ of certiorari was filed on November 10, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury retrial[1] in the United States District Court for the District of New Mexico, petitioner was convicted on three counts of transporting stolen motor vehicles, in violation of 18 U.S.C. 2313, two counts of receiving stolen vehicles, in violation of 18 U.S.C. 2313, and one count of conspiring to receive, transport and conceal such vehicles, in violation of 18 U.S.C. 371 (Pet. App. A-2). He was sentenced to five years' imprisonment on the conspiracy count and three years' imprisonment on each of the substantive counts, all the terms to run concurrently.

1. Following his conviction, petitioner filed a direct appeal (No. 79-1004, 10th Cir.). After the case had been briefed and set for argument, however, he filed a motion to remand the case to the district court (Pet. App. B-4). In his motion, petitioner stated that he intended to file with the district court a motion for dismissal of the charges or, in the alternative, a motion for a new trial based on newly-discovered evidence (*id.* at B-15 n.5). On September 7, 1979, a single judge of the court of appeals granted the motion and remanded the case to the district court (*id.* at B-21 to B-22 n.6).

2. On remand, the district court denied petitioner's motion for a new trial. Petitioner then took an appeal from that order (No. 79-2180, 10th Cir.). Simultaneously, petitioner filed an amended notice of appeal in No. 79-1004, in which he attempted to revive the issues he had presented in his initial direct appeal. A panel of the court of appeals affirmed the district court's order denying petitioner's new trial motion (Pet. App. A-6). However, the panel held sua sponte that it lacked jurisdiction to address the questions

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[1]The court of appeals reversed petitioner's conviction following his first trial (see Pet. App. A-3).

raised by petitioner's direct appeal in No. 79-1004. The panel reasoned that, although it was "absolutely clear * * * that [petitioner] did not intend that his remand motion * * * foreclose his future appeal on the merits," the motion was by its terms "unconditional," and the order granting the motion thus terminated the court's jurisdiction over the direct appeal (Pet. App. A-10 to A-11).

3. On rehearing en banc, the court adhered to the ruling of the panel (Pet. App. B-1 to B-23). Stating that petitioner's remand motion, "in practical effect, constituted an abandonment of any appeal going to the merits of his conviction," the court held that its unqualified remand of the case on the basis of that motion operated to divest the court of jusisdiction over the direct appeal (*id.* at B-6 to B-7). The en banc court observed, nevertheless, that examination of the merits of the claims presented in the direct appeal clearly indicated "that [petitioner's] grounds for reversal are unsubstantial" (*id.* at B-7).

Judges Holloway and Logan dissented from the court's dismissal of the direct appeal (Pet. App. B-10 to B-23). First, the dissent observed that there was no direct authority for the proposition that entertainment of a renewed appeal challenging the underlying conviction following remand for a new trial motion is foreclosed unless the remand motion is explicitly worded so as to make it clear that the remand request is limited and not unconditional. Second, the dissent reasoned that, in any event, petitioner's motion could not be read as intending to ask for dismissal or outright abandonment of his original appeal. In the view of the dissenters, the application to petitioner's case of the court's procedural rule requiring that a motion to remand clearly indicate its qualified nature "unjustly defeats consideration of a criminal appeal on its merits" (Pet. App. B-11).

ARGUMENT

We agree with petitioner that the reasoning of the court of appeals is erroneous. Nevertheless, in the circumstances of this particular case, we question the need for this Court's intervention.

1.a. Fed. R. Crim. P. 33 provides, in part, that "[a] motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case." While the rule circumscribes the granting of a new trial motion, it does not specify the procedure to be followed for making and hearing such a motion while the case is pending on appeal. In the absence of clear guidance in the language of the rule itself, the courts of appeals generally have required the defendant initially to move for a new trial in the district court. That court has at least two choices when presented with such a motion. First, it may deny the motion, in which case any appeal from that denial may be consolidated with the pending appeal on the merits. Alternatively, the district court may decide that it would grant the motion if it had jurisdiction to do so. In such circumstances, the district court issues a certificate advising the court of appeals that it would grant the motion for a new trial if the case were remanded to it for that purpose.[2] The defendant then moves the court of appeals to remand the case to the district court so that it may grant the new trial motion. See, *e.g.*, *United States* v. *Blanton*, 697 F.2d 146 (6th Cir. 1983); *United*

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[2]The Sixth Circuit held in *United States* v. *Blanton*, 697 F.2d 146, 148 (6th Cir. 1983), that the district court has a third option of "declin[ing] to rule with finality on the motion until after the appeal is concluded." This option is not relevant to the instant case.

States v. *Phillips*, 558 F.2d 363 (6th Cir. 1977); *United States* v. *Frame*, 454 F.2d 1136, 1138 (9th Cir.), cert. denied, 406 U.S. 925 (1972).[3]

Alternatively, the Fifth Circuit permits a defendant first to seek a remand from the court of appeals to enable the district court to entertain a new trial motion. See *United States* v. *Fuentes-Lozano*, 580 F.2d 724 (1978). Following the district court's denial of the defendant's new trial motion in that case, the Fifth Circuit heard and decided the defendant's direct appeal under the same docket number originally assigned to it. *United States* v. *Fuentes-Lozano*, 600 F.2d 552 (1979). In neither opinion was it even suggested that the remand from the court of appeals operated to divest that court of jurisdiction over the direct appeal for all time.[4] Cf. *United States* v. *Butler*, 636 F.2d 727, 729 n.** (D.C. Cir. 1980), in which the court permitted the defendant to withdraw his original brief in order to file a motion for a new trial with the district court. Following the denial of that

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[3]As explained by the Ninth Circuit in *Frame*, it appears to have been the intent of the drafters of Rule 33 that a new trial motion be made in the district court in the first instance. This conclusion follows from a comparison of Rule 33 with its predecessor, which "provided that a motion for new trial could be 'entertain[ed]' by a trial court 'only on remand of the case by the appellate court for that purpose.' Rule II(3), 292 U.S. 662 (1934)" (454 F.2d at 1137 n.1). The new language of the rule was " 'intended to change the existing practice pursuant to which a remand of the case from the appellate court must be secured before the motion for a new trial is made in the trial court. * * * This course will eliminate the need of a remand in those cases in which the trial court determines to deny a motion for a new trial' Fed. R. Crim. P., p. 131 (2d Prelim. Draft 1944)" (454 F.2d at 1138 n.2).

[4]It is true that the defendant in *Fuentes-Lozano* specifically requested a "temporary remand" (580 F.2d at 725), but, for the reasons discussed below, we do not think the exact phrasing of the defendant's motion should necessarily be controlling. In any event, the Fifth Circuit treated Fuentes-Lozano's motion as though it were "without qualification" (*ibid.*).

motion, the court of appeals consolidated the defendant's appeal from the denial of the new trial motion with his earlier direct appeal, without suggesting that it had ever lost jurisdiction over the direct appeal.

In our view, it makes little difference which procedure is followed, and the choice may appropriately be left to each court of appeals to decide for itself.[5] We suggest, however, that in the absence of a clear and unambiguous indication that the defendant actually intends to abandon his direct appeal in favor of the new trial motion, a remand from the court of appeals should be construed as a limited relinquishment of jurisdiction for the purpose of allowing the district court to consider the new trial motion; absent clear evidence to the contrary, the remand should be interpreted as preserving the court of appeals' jurisdiction over the direct appeal in the event the district court denies the new trial motion. Thus, in the case of a circuit that permits the remand motion to be filed initially in the court of appeals, that court should hold the case in abeyance pending the trial court's determination whether it would grant or deny the motion for a new trial. See *United States* v. *Smith*, 331 F.2d 145, 146 (6th Cir. 1964).[6]

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[5]As noted, however (see page 5 note 3, *supra*), it appears that the drafters of Rule 33 intended a defendant to present his motion initially to the district court.

[6]We recognize, as did the court below (Pet. App. A-10 to A-11, B-8), that an "unqualified" remand ordinarily operates to divest the court of appeals of all jurisdiction. It is unquestioned, however, that an appellate court has the authority to order a limited remand while retaining jurisdiction over the case. See, *e.g.*, *United States* v. *Adams*, 73 U.S. (6 Wall.) 101 (1868); *Beck* v. *Federal Land Bank*, 146 F.2d 623, 624 (8th Cir. 1945). Accordingly, in light of the fundamental importance of a defendant's right to appeal, cf. *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), we suggest that a remand order in cases such as this should be given a construction that operates in favor of preserving the direct appeal unless there is clear evidence that a contrary result was intended by the defendant.

b. In this case, the panel found that it was "absolutely clear" (Pet. App. A-11) that petitioner did not intend to abandon his direct appeal when he sought a remand for purposes of making a new trial motion. Sitting en banc, however, the court construed the motion for remand as an "abandonment" of the direct appeal (Pet. App. B-6 to B-7). We agree with the dissenting opinion (Pet. App. B-14 to B-18) that petitioner's motion cannot fairly be construed as an abandonment of his direct appeal and that the majority erred in effectively converting a motion to remand into a motion to dismiss. Similarly, the court's order granting the motion to remand cannot fairly be interpreted as dismissing the appeal (Pet. App. B-21 & n.6).

Nevertheless, it seems abundantly clear that petitioner suffered no prejudice from the court's decision in this case. Even though the court of appeals held that it lacked jurisdiction over petitioner's direct appeal, it nevertheless examined the issues petitioner raised in that appeal and observed that "his grounds for reversal are unsubstantial" (Pet. App. B-7). Since this determination was made by a majority of the en banc court, there is no reason to believe that petitioner would fare any better if his case were remanded to the court of appeals for direct consideration.

Equally important, petitioner's initial notice of appeal in No. 79-1004 (the direct appeal) was untimely. Petitioner conceded this point in the court of appeals (see 79-1004 Appellant's Br. Concerning Jurisdiction 2 (10th Cir. filed Jan. 21, 1981), and acknowledged that the timely filing of a notice of appeal is jurisdictional (*ibid.*). Nevertheless, petitioner sought to have his untimely filing overlooked on the ground of excusable neglect. But a finding of excusable neglect must be sought from the district court (Rule 4(b), Fed. R. Crim. P.) and may not, in any event, extend the time limits by more than 30 days (79-1004 Appellant's Br.

Concerning Jurisdiction 2). Petitioner never sought relief from the district court and, at the time of his attempt at showing excusable neglect in the court of appeals, the power of the district court to extend the time limits had long since expired. Thus, the court of appeals could have disposed of petitioner's direct appeal on this basis alone, and petitioner would have no grounds for complaint.

Accordingly, the situation in this case is such that petitioner himself has not been prejudiced by the court of appeals' erroneous ruling. And the decision is unlikely to have any adverse effect on future litigants in the Tenth Circuit because it should now be clear to all defense counsel practicing within that circuit that they should either present their new trial motions to the district courts in the first instance or, should they choose to proceed in the court of appeals initially, phrase their motions for remand in terms that unmistakably indicate their intention to preserve their direct appeal. Under these circumstances, further review by this Court is unnecessary.

2. Petitioner also claims that he was denied the effective assistance of counsel because his lawyer initially sought a remand in the court of appeals rather than moving for a new trial in the district court. Although adoption of the latter course would have prevented the difficulties petitioner later encountered, there is no sound basis for faulting petitioner's counsel. No court had ever held that the grant of an "unqualified" motion for remand would be deemed an abandonment of the direct appeal, and petitioner's counsel cannot fairly be charged with anticipating the court of appeals' decision in this case. The attorney's actions, therefore, did not fall below "the range of competence demanded of attorneys in criminal cases." *McMann* v. *Richardson*, 397 U.S. 759, 771 (1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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